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No. 97-924

In The

Supreme Court of the United States

October Term, 1997

HARRY R. HIBBS, JESSICA HIBBS, HENRY HOLIDAY,

Petitioners,

vs.

CITY OF SAN BUENAVENTURA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Six

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is Petitioners' Fifth Amendment challenge to California's standard for judicial review of special assessments properly before this Court when: (a) Petitioners did not raise that issue before the trial court; and (b) Petitioners' Fifth Amendment claim was severed from this action?

2. If so, does California's standard for judicial review of special assessments satisfy the Takings Clause when, pursuant to that standard, the record of proceedings before the legislative body must show both that: (a) the assessed properties will receive special benefits from the improvements to be funded by the assessments over and above those received by the general public; and (b) the special assessments are proportional to the benefits to be bestowed on such properties?

3. Did the City comply with the Due Process Clause of the Fourteenth Amendment when, prior to forming the assessment district, the City Council provided extensive notice of the special assessments and held a public hearing at which every affected property owner was given ample opportunity to protest and to testify regarding the proposed assessments?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statement of the Case	1
A. Petitioners' Property and the Formation of the Assessment District.	2
B. Proceedings Below	5
Reasons for Denying the Writ	9
I. Petitioners' Fifth Amendment Challenge To California's Standard For Judicial Review Of Special Assessments Is Not Properly Before This Court Both Because: (1) Petitioners Did Not Present That Claim To The Trial Court; And (2) Petitioners' Fifth Amendment Claim Was Severed From This Action.	9
II. Petitioners' Fifth Amendment Takings Claim Does Not Merit Review Because: (1) The Federal Standard For Judicial Review Of Special Assessments Is Well Settled; And (2) California's Standard Of Review Is The Same As The Federal Standard.	11

Contents

	Page
III. Petitioners' Fifth Amendment Takings Claim Does Not Merit Review Because California's Standard For Judicial Review Of Special Assessments Is Consistent With The Principles Announced By This Court In *Nollan* And *Dolan*.	15
IV. Petitioners' Due Process Claim Does Not Merit Review Because Both The Trial Court And The Court Of Appeal Properly Rejected That Claim.	17
Conclusion	20

TABLE OF CITATIONS

Cases Cited:

Armstrong v. United States, 364 U.S. 40 (1960)	16
Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 96 F.2d 648 (D.C. Cir. 1992)	13
Costello v. Los Angeles, 54 Cal. App. 3d 28, 126 Cal. Rptr. 462 (1975)	14
Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996) *cert. denied*, __ U.S. __, 117 S. Ct. 1249, 137 L. Ed. 2d 330 (1997)	10
Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 129 Cal. Rptr. 97, 547 P.2d 1337 (1976)	14

Contents

Page

Dolan v. City of Tigard, 512 U.S. 374 (1974) 6, 15, 16

Federal Deposit Ins. Corp. v. City of New Iberia, 921 F.2d 610 (5th Cir. 1991) 13

French v. Barber Asphalt Paving Co., 181 U.S. 324 (1901) 13

Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986) 13

Harrison v. Board of Supervisors of County of San Mateo, 44 Cal. App. 3d 852, 118 Cal. Rptr. 828 (1975) ... 14

Houk v. Little River Drainage Dist., 239 U.S. 254 (1915) 13

Knox v. City of Orland, 4 Cal. 4th 132, 14 Cal. Rptr. 2d 159, 841 P.2d 144 (1992) 14, 17

Myles Salt Co., Ltd. v. Board of Comm'rs of the Iberia and St. Mary Drainage Dist., 239 U.S. 478 (1916) 13

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 6, 15, 16

Norwood v. Baker, 172 U.S. 269 (1898) .. 11, 12, 13, 14, 19

Singleton v. Wulff, 428 U.S. 106 (1976) 10

Contents

Page

Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal. App. 3d 545, 169 Cal. Rptr. 391(1980) .. 17

Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 P. 217 (1915) 14

United States Constitution Cited:

Fifth Amendment ..... i, 1, 6, 9, 10, 11, 15, 17

Fourteenth Amendment ..... i, 8, 9, 17, 19

Rule Cited:

California Rule of Court 5.1(f) 3

APPENDIX

Appendix A — Ruling Of The Superior Court Of The State Of California For The County Of Ventura Dated April 15, 1992 ..... 1a

Appendix B — Order Staying Proceedings Of The Superior Court Of California, County Of Ventura Filed August 26, 1996 ..... 5a

Appendix C — Order Continuing Stay Of Proceedings Of The Superior Court Of California, County Of Ventura Filed December 17, 1997 ..... 6a

Respondent City of San Buenaventura respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the California Court of Appeal's unpublished decision in this case.

OPINIONS BELOW

In addition to the four opinions set forth in the Petition for Writ of Certiorari ("Petition"), the following ruling was issued in this case: the order of the Ventura County Superior Court severing Petitioners' fifth cause of action for inverse condemnation from this suit and consolidating that cause of action with *Adams v. City of San Buenaventura*, Superior Court Case No. 113842. A copy of that ruling is attached hereto as Appendix A ("App. A").

Pursuant to stipulation of the parties, the *Adams* case has been stayed pending final disposition of the appeal in this case. The orders of the Ventura County Superior Court staying the *Adams* case and continuing the stay are attached hereto as Appendices B ("App. B") and C ("App. C"), respectfully.

STATEMENT OF THE CASE

Respondent City of San Buenaventura ("City") presents the following Statement of the Case to supplement that presented by Petitioners Harry R. Hibbs *et al.* ("Hibbs Petitioners" or "Petitioners"). Petitioners' statement contains several inaccurate statements, mischaracterizes the bases for the lower courts' rulings, and conveniently glosses over the trial court's decision to sever their Fifth Amendment takings claim from this action. What follows is a correction of the erroneous statements and a more complete and balanced presentation of the City's actions in forming the assessment district.

A. Petitioners' Property and the Formation of the Assessment District.

This case concerns a challenge to Porto Bello Assessment District No. 91-1 ("assessment district"), formed by the City in 1991 to dredge, repair and maintain the water channels in the Ventura Keys Subdivision. The subdivision consists of 299 waterfront homes built on three navigable, man-made channels ("Keys Channels") located at the base of the Arundell Barranca, a natural drainage which carries rainwater and sediment from hillsides surrounding the City to the Pacific Ocean. Administrative Record (hereinafter "AR"), pp. 2464-65, 2611. Petitioners own homes within the subdivision. Each subdivision lot has an appurtenant, private boat slip and dock easement within the Keys Channels. AR 2610-11, 2648, 2652.

At the time the subdivision application was approved, both the City and the developer recognized that mud and debris from the Arundell Barranca would render the Keys Channels unnavigable unless the waterways were dredged periodically.[1] AR 2464, 2518. Hence, in accepting the grant deed by which the developer dedicated the channels ("Parcel A") to the City, the City expressly reserved the right to levy assessments against the subdivision properties in order to finance the dredging and other channel maintenance work. The grant deed provides:

> Said City of San Buenaventura by its acceptance of this deed reserves all of its rights and privileges which

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1. The record contains no support for Petitioners' bizarre assertion that "[t]he public's construction of the Ventura Marina created [the siltation] problems." Petition at 10. Sedimentation occurs as a result of soil erosion and local geography, which would occur regardless of any action the City has taken. AR 2464-65, 2519-20, 2650, 2660, 2664. As the assessment district engineer's report explains in detail, urbanization in the Arundell Barranca watershed has resulted in a *decrease* of sedimentation in the Keys Channels. AR 2519, 2649-50, 2660-61, 2664.

> it now has or may hereafter have under applicable laws to levy or impose taxes, *assessments*, permits and other charges against the land to which said parcel "A" is adjacent or any parts or portions thereof, for the maintenance and control of the lands transferred to the City hereby.

PR 1358; RA 005 (emphasis added).[2]

Over the years, the City dredged the Keys Channels periodically, using a combination of funds collected from a now defunct maintenance district to which the subdivision property owners contributed, and federal emergency management funds. AR 2367-68. By 1990, the Keys Channels were again in need of dredging and other repairs, and the City Council directed its staff to prepare a proposal for creating an assessment district to finance that work. AR 1-2, 2368. The City retained William Stookey of Willdan Associates, an engineering consultant, to prepare a comprehensive engineer's report analyzing the technical aspects of the proposed assessment district. AR 1, 2769-70. Mr. Stookey had over 40 years of engineering experience and had helped create more than 200 assessment districts. AR 2516, 2655.

The 87-page engineer's report prepared by Mr. Stookey concludes that the dredging and other repair work would confer numerous "special" benefits on Petitioners' properties, beyond those received by the general public. AR 2581-2668. The report states that the proposed improvements would: (1) enable Petitioners to continue using their private easements within the Keys Channels; (2) allow Petitioners to dock boats adjacent to their homes instead

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2. "PR" refers to Appellants' Joint Appendix in lieu of Clerk's Transcript filed by appellants in conjunction with their opening appellate briefs. "RA" refers to Respondent's Appendix filed by the City in conjunction with its brief in opposition to Appellants' Opening Briefs pursuant to California Rule of Court 5.1(f).

of having to rent a boat slip in a marina or use dry storage; (3) provide clear access to the harbor; (4) increase the value of Petitioners' properties; and (5) enhance Petitioners' views, living environment, and other aesthetic values. AR 2652. The report further states that

> maintenance and repair of the rock revetment is a specific benefit to those properties fronting the Ventura Keys waterways. The general public does not benefit from this slope repair activity since all repairs occur within the easements granted for usage to the property owner.

AR 2651.

Mr. Stookey also found that the dredging would provide a limited recreational benefit to the public. His report therefore recommended that 25 percent of the cost of the dredging be borne by the City. AR 2651. The report recommended that the remaining 75 percent of the cost be financed by special assessments on the subdivision properties. Mr. Stookey based this cost allocation on the degree to which the proposed improvements would specially benefit the assessed properties, as compared to the public generally. AR 2651-52. He also determined that the special assessments should be spread equally among the assessed properties, because the special benefits that those properties would receive from the improvements would not vary measurably based on lot size or other factors. AR 2652.

After the engineer's report was prepared, the City Council held a hearing to receive public comment on the report. AR 180-253. At the conclusion of the hearing, the Council adopted a Resolution of Intention to form the assessment district. AR 243-49, 2763-77. Thereafter, the City held two public workshops to answer questions about the engineer's report. AR 2369. On

September 23 and 24, 1991, the City Council held a two-day public "protest" hearing to give affected homeowners an opportunity to testify regarding the proposed assessment district. AR 2508-77, 2799-2887. At the conclusion of the protest hearing, the Council approved the engineer's report, ordered the improvements, and levied the assessments, thereby forming the assessment district.

The assessment district levied an assessment of approximately $1,622 per year on each of the 299 waterfront homes having an appurtenant boat slip and dock easement.[3] AR 2640-47, 2945. In accordance with the engineer's report, the City Council assessed 75 percent of the dredging and repair costs on the property owners, and determined that the remaining 25 percent of the cost would be borne by the City. AR 248-49, 2651, 2778, 2782A, 2783, 2858, 2866-67, 2879-80.

B. Proceedings Below

Shortly after the assessment district was formed, on October 15, 1991, a group of subdivision property owners filed a mandamus action challenging the validity of the assessment district under the caption *Aggen et al. v. City of San Buenaventura* (Ventura County Superior Court Case No. 118395) ("*Aggen*"). PR 4. The initial suit was followed by a second mandamus action filed on October 23, 1991, *Traylor et al. v. City of San Buenaventura* (Ventura County Superior Court Case No. 118544). PR 2292. The trial court consolidated the first two suits on December 23, 1991, under the *Aggen* caption. PR 1566-68.

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3. Petitioners' assert incorrectly that, "[f]or 1991 alone, the special assessment was . . . $9,147.17 [for] each and every homesite. . . ." Petition at 5. While the *total* assessment on each parcel will be approximately $9,147.17, the estimated average *annual* assessment on each parcel is $1,622 and did not exceed $1,680 during the first year. AR 2640-47, 2945; *see also* Petition at 70a (modified opinion of the Court of Appeal).

A third suit was filed by the Hibbs Petitioners on December 24, 1991, *Hibbs et al. v. City of San Buenaventura* (Ventura County Superior Court Case No. 119484). PR 1936. Unlike the other actions, the Hibbs complaint included a cause of action for inverse condemnation under the Fifth Amendment. PR 1945-52. On April 15, 1992, the trial court issued an order that: (1) severed the Hibbs Petitioners' cause of action for inverse condemnation from the other causes of action; and (2) consolidated the remainder of the Hibbs complaint with the ongoing action in *Aggen*. App. A at 1a-2a, 4a. In that same order, the court consolidated the Hibbs Petitioners' Fifth Amendment takings claim with *Adams et al. v. City of San Buenaventura et al.* (Ventura County Superior Court Case No. 113842) ("*Adams*"). App. A at 2a. The *Adams* case is currently before the Ventura County Superior Court, but has been stayed, pursuant to stipulation of the parties, pending final disposition of this action. Apps. B and C.

After extensive briefing and argument, the trial court issued its decision upholding the assessment district. *See* Petition at 1a to 46a (Statement of Decision). The court found that "[t]he Administrative Record supports the City's determination of special benefit to the properties included in [the] 1991 District." Petition at 28a. The court also found that "there is no material dispute over the proportionality of the assessments among the Keys properties," and that the administrative record supports the City's cost allocation. Petition at 32a.

With regard to the standard of review, the court found that the Hibbs Petitioners "essentially, and correctly, *concede* that *Dawson* [*v. Town of Los Altos Hills*, 16 Cal. 3d 676, 129 Cal. Rptr. 97, 547 P.2d 1337 (1976),] applies." Petition at 24a (emphasis added). This Court will note that the trial court's statement of decision does not address Petitioners' new argument that the *Dawson* standard of review violates the Fifth Amendment's Takings Clause, as construed in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1974).

The reason is simple: ***Petitioners did not present their Fifth Amendment challenge to California's standard for judicial review of special assessments to the trial court.***

Petitioners did repeatedly (and improperly) attempt to import their takings arguments into this case, but they did do so in the context of attacking the City Council's special benefit determination, not to challenge the applicable standard of review. The trial court rejected those arguments on the ground that, since the court previously had severed Petitioners' takings claim, the issue was not properly before the court. The court's decision states:

> In effect, petitioners implicitly incorporate the *Adams* case allegations into the *Aggen* cases even though the tort and inverse condemnation issues are to be the subject of a later trial. Petition at 30a.

And:

> As stated above, petitioners' special benefit argument addresses liability issues. Petitioners argue that the City has engaged in misconduct by using the Keys channels as a "debris basin" for the City's drainage system. Similar arguments are repeated in different forms throughout petitioners' points and authorities (Aggen and Hibbs). In fact, . . . petitioners' arguments *usually* touch on liability issues alleged in the *Adams* cases. Petition at 35a-36a (original emphasis).

And again:

> As stated above, the instant *Aggen* mandate cases are separate and distinct from the *Adams* liability cases. The inverse condemnation/nuisance argument may or may not have merit, and the cited *Yue* case may or may

> not be relevant, but the argument does not belong in the instant case. Petition at 36a.

The trial court also flatly rejected Petitioners' claim that the City's assessment district procedures violated the Due Process Clause of the Fourteenth Amendment. Petition at 44a-46a. The court found that "the Administrative Record is filled with substantial evidence of petitioners' participation in hearings, and filing of protests and other materials." Petition at 45a.

In an unpublished opinion, the Court of Appeal affirmed the trial court's decision upholding the assessment district. Petition at 48a-68a (Opinion of the Court of Appeal). The court found that "[t]he engineer's report clearly supports the [City's] finding[s] that the improvement[s] will specially benefit [Petitioners'] propert[ies]," and that "the assessment on each parcel is proportionate to the special benefit enjoyed by each property." Petition at 58a, 61a. With regard to Petitioners' "takings" arguments, the Court of Appeal agreed with the trial court that the issue "does not belong in the instant case" because "[t]he damage claims were severed and [are] not part of the validation action." Petition at 58a. The court also concluded that the Hibbs Petitioners' due process claims were "without merit" because:

> [The] City made the engineer's report available for review 35 days before the protest hearing. Two public workshops were held to respond to questions and consider public comments. At the protest hearing, counsel for the Save the Keys committee was granted an hour to testify and 54 persons addressed the city council. The City council continued the hearing to give everyone an opportunity to speak.

Petition at 66a.

Of the three groups of original plaintiffs, only the Hibbs plaintiffs petitioned the California Court of Appeal for rehearing, and the California Supreme Court for review. The California Court of Appeal denied the petition for rehearing on July 18, 1997. Petition at 69a-70a. The California Supreme Court denied the petition for review on September 3, 1997. Petition at 71a. The City urges this Court to do likewise and put a final end to this clearly meritless litigation, which does not raise a single issue meriting review by this Court.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' FIFTH AMENDMENT CHALLENGE TO CALIFORNIA'S STANDARD FOR JUDICIAL REVIEW OF SPECIAL ASSESSMENTS IS NOT PROPERLY BEFORE THIS COURT BOTH BECAUSE: (1) PETITIONERS DID NOT PRESENT THAT CLAIM TO THE TRIAL COURT; AND (2) PETITIONERS' FIFTH AMENDMENT CLAIM WAS SEVERED FROM THIS ACTION.

Petitioners assert that California's standard for judicial review of special assessments violates the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. Petition at 9-12. However, they present no coherent argument in support of their claim. Instead, Petitioners focus on the particular facts of this case, arguing that, because the City allegedly "caused" the sedimentation problem in the Keys Channels, requiring Petitioners to pay for the channel dredging would effect a "taking" of their property. *See* Petition at 10-11, 13-15.

There are two insurmountable obstacles to this Court's review of Petitioners' takings claim. First, as both the trial court and the

Court of Appeal correctly determined, Petitioners' "takings" arguments do not belong in the instant case, because the trial court has severed the takings claim from this action. App. A at 1a, 4a. Petitioners will have ample opportunity to present their takings arguments in the *Adams* litigation, currently pending before the Ventura County Superior Court. The issue of who or what "caused" the siltation of the Keys Channels will be decided in the *Adams* case. That factual question clearly is not appropriate for resolution in the first instance by this Court.

Second, Petitioners did not raise the issue of whether California's standard for judicial review of special assessments complies with the Takings Clause in the trial court. Consequently, neither the trial court nor the Court of Appeal addressed that issue. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Crawford v. Lungren*, 96 F.3d 380, 389 n.6 (9th Cir. 1996) *cert. denied*, __ U.S. __, 117 S. Ct. 1249, 137 L. Ed. 2d 330 (1997), (the trial court "is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal"). Petitioners identify no exceptional circumstance that would justify departure from that general rule, and indeed there is none.

In short, Petitioners' Fifth Amendment claim is not properly before this Court. Even if the claim were properly presented, however, the issue does not even conceivably merit this Court's review for the reasons set forth in Points II and III below.

II.

PETITIONERS' FIFTH AMENDMENT TAKINGS CLAIM DOES NOT MERIT REVIEW BECAUSE: (1) THE FEDERAL STANDARD FOR JUDICIAL REVIEW OF SPECIAL ASSESSMENTS IS WELL SETTLED; AND (2) CALIFORNIA'S STANDARD OF REVIEW IS THE SAME AS THE FEDERAL STANDARD.

California's standard for judicial review of special assessments is consistent with federal court decisions dating back nearly a century. In the seminal case, *Norwood v. Baker*, 172 U.S. 269, 279 (1898), this Court held that special assessments are a valid exercise of a local government's taxation power, provided that: (1) the public improvements to be funded by an assessment will confer "special" benefits on the assessed properties beyond those received by the general public; and (2) the assessment is not in "substantial excess" of the special benefits accruing to such properties. Since that time, the federal courts have uniformly applied the *Norwood* standard in reviewing special assessments. California's standard for judicial review of special assessments is the same as the federal standard.

In *Norwood*, a municipality condemned certain lands for the purpose of opening a street, and then levied assessments against all properties adjoining the new street in order to recover the entire cost of the condemnation proceedings. Plaintiff challenged the special assessments, arguing that they effected a taking of his property in violation of the Fifth Amendment.

First, this Court recognized the long-standing authority of local governments to levy special assessments in order to fund public improvements that provide special benefits to the assessed properties:

> Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property — *such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements.* And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements.

Norwood, 172 U.S. at 277-78 (emphasis added; citations omitted). The Court noted, however, that the legislature's power to levy special assessments is not unlimited:

> There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. . . .
>
> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, or private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over

> special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.

Id. at 278-79.

Subsequent federal decisions have confirmed that special assessments do not constitute a taking of private property for public use, so long as the assessments are grounded upon the degree of benefit conferred on the assessed properties. *See, e.g., Myles Salt Co., Ltd. v. Board of Comm'rs of the Iberia and St. Mary Drainage Dist.*, 239 U.S. 478, 485 (1916); *Houk v. Little River Drainage Dist.*, 239 U.S. 254, 265 (1915); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 344-45 (1901); *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 96 F.2d 648, 654 (D.C. Cir. 1992); *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610, 614-16 (5th Cir. 1991); *Furey v. City of Sacramento*, 780 F.2d 1448, 1454-55 (9th Cir. 1986). Petitioners do not even bother to discuss this long and unbroken line of authority, nor do they identify a single case that conflicts with the principles announced nearly a century ago in *Norwood*.

California's standard for judicial review of special assessments is essentially the same as the standard established in *Norwood*. Under California law:

> A special assessment finally confirmed by a local legislative body in accordance with applicable law will not be set aside by the courts unless it clearly appears on the face of the record before that body, or from facts which may be judicially noticed, that the assessment as finally confirmed is not proportional to the benefits to be bestowed to the properties to be assessed or that no benefits will accrue to such properties.

Knox v. City of Orland, 4 Cal. 4th 132, 146, 14 Cal. Rptr. 2d 159, 841 P.2d 144 (1992) (quoting and reaffirming the standard of review established in *Dawson v. Town of Los Altos Hills*, 16 Cal. 3d at 685). Pursuant to this standard, special assessments will be upheld by the courts only if the record of proceedings before the legislative body demonstrates that: (1) the improvements to be funded by the assessments will confer a special benefit on the assessed properties; and (2) the assessments are proportional to the benefits received. As the California Supreme Court has made clear, the special benefit that accrues to the assessed property is "the warrant, and the sole warrant, for the legislature itself to impose the burdens of these special assessments." *Spring Street Co. v. City of Los Angeles*, 170 Cal. 24, 30, 148 P. 217 (1915). In addition, the amount of the special assessments must be "proportional to the benefits to be bestowed on the properties to be assessed. . . ." *Dawson*, 16 Cal. 3d at 685. California's standard of "proportionality" plainly is the functional equivalent of *Norwood*'s requirement that the assessments not be in "substantial excess" of the benefits accruing to the properties.

California's standard of review of special assessments is no mere "rubber stamp" on the public entity's actions in forming the assessment district. The California courts have not hesitated to invalidate special assessments where the record fails to demonstrate either that the improvements will confer special benefits on the assessed properties or that the assessments are proportional to the benefits received. *See, e.g., Harrison v. Board of Supervisors of County of San Mateo*, 44 Cal. App. 3d 852, 857-59, 118 Cal. Rptr. 828 (1975) (invalidating special assessments where no substantial evidence of special benefit accruing to the assessed properties); *Costello v. Los Angeles*, 54 Cal. App. 3d 28, 30-32, 126 Cal. Rptr. 462 (1975) (invalidating special assessments where city used an arbitrary method of apportionment).

In this case, however, the evidence of both special benefit and proportionality is overwhelming. Both the trial court and the Court

of Appeal upheld the City's findings of special benefit and proportionality based on the evidence contained in the engineer's report and elsewhere in the administrative record. As the trial court stated: "Facilitating the docking of private boats by owners of waterfront properties is as far from a general public interest as a public improvement can be." Petition at 27a.

In sum, California's standard for judicial review of special assessments is consistent with nearly a century of federal jurisprudence. Petitioners do not even bother to discuss that authority, nor do they identify any conflict in the law governing special assessments, as there is none. Petitioners' Fifth Amendment challenge to California's standard of review therefore does not merit review.

III.

PETITIONERS' FIFTH AMENDMENT TAKINGS CLAIM DOES NOT MERIT REVIEW BECAUSE CALIFORNIA'S STANDARD FOR JUDICIAL REVIEW OF SPECIAL ASSESSMENTS IS CONSISTENT WITH THE PRINCIPLES ANNOUNCED BY THIS COURT IN *NOLLAN* AND *DOLAN*.

Petitioners argue that California's standard for judicial review of special assessments violates the Takings Clause, as construed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Petition at 9-12. However, unlike *Nollan* and *Dolan*, this case does not present a regulatory takings claim, and Petitioners fail to make any connection between the issues presented here and those arising in the context of land use regulation. Simply put, the formation of an assessment district does not involve the type of "leveraging" or land-use bargaining between property owners and regulatory agencies with which this Court was concerned in *Nollan* and *Dolan*.

However, even assuming *arguendo* that the principles announced in *Nollan* and *Dolan* have some application in the context of special assessment financing, California's standard of judicial review is entirely consistent with those principles.

In both *Nollan* and *Dolan*, the plaintiff landowners were required to dedicate a portion of their property for public use as a condition for approval of a land use permit. *Nollan* held that the Takings Clause requires that there be a reasonable connection or "essential nexus" between the permit condition and the public purpose advanced as the justification for the condition. 483 U.S. at 837. *Dolan* addressed the degree of the required connection and adopted a test of "rough proportionality," requiring the government agency to make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." 512 U.S. at 391.

California's test for determining the validity of an assessment district comports with the principles announced in *Nollan* and *Dolan*. First, California's standard of review ensures that there is an "essential nexus" between the projects to be funded by special assessments and the properties to be specially assessed; the legislative body must demonstrate on the record that those projects will confer a "special benefit" on the assessed properties. In addition, California's standard of review incorporates the "rough proportionality" test by requiring the legislative body to demonstrate that the amount of the assessments are "proportional" to the benefits accruing to the assessed properties.

Moreover, while one of the principle purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), California's standard of review furthers this purpose by requiring the assessments to be based on special benefit.

As the California Supreme Court has explained, the principle underlying special assessments is that "[t]he general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public." *Knox*, 4 Cal. 4th at 142 (quoting *Solvang Mun. Improvement Dist. v. Board of Supervisors*, 112 Cal. App. 3d 545, 552, 169 Cal. Rptr. 391(1980)).

In sum, California's standard for judicial review of special assessments ensures that the legislative body adheres to the strictures of the Takings Clause. Petitioners' Fifth Amendment challenge to that standard does not merit review.

IV.

PETITIONERS' DUE PROCESS CLAIM DOES NOT MERIT REVIEW BECAUSE BOTH THE TRIAL COURT AND THE COURT OF APPEAL PROPERLY REJECTED THAT CLAIM.

Petitioners argue that the City violated their due process rights under the Fourteenth Amendment by levying the special assessments "without first providing them with notice and a fair and meaningful hearing appropriate to the circumstances." Petition at 13. There is no merit to this contention. The record shows that the City provided extensive notice of the proposed assessment district and gave the affected homeowners ample opportunities to be heard.

On August 19, 1991, the City publicly declared its intention to form the assessment district by taking the following actions. First, the City Council approved a Resolution of Intention to form the assessment district. AR 2768-74. The Resolution of Intention described the projects to be funded by the assessment district and specified the exterior boundaries of the district. AR 2768-74.

Second, the City adopted a resolution setting the time, place, and date for a public hearing to receive comment on the proposed assessment district. AR 2775-77. Third, the City publicized these actions by posting, mailing, and publishing in a newspaper of general circulation notices regarding: (1) the passage of the Resolution of Intention; (2) the boundaries of the proposed assessment district; (3) the amount of the proposed assessments; and (4) the time, place and date of the protest hearing. AR 254-61, 2776.

The City made the engineer's report available for public review at least 35 days prior to the protest hearing. AR 21-24, 198, 2775; *see also* Petition at 66a. The report contains a description of the improvements to be funded by the proposed assessment district, a cost estimate for the improvements, a diagram depicting the exterior boundaries of the assessment district and the specific parcels of land within the district, and an assessment roll showing the costs to be borne by each of the subdivision properties. AR 2598-2605, 2609-13, 2616-47. The report also contains an analysis of the degree to which the proposed improvements would benefit the assessed properties and the public generally. AR 2648-52. On September 12 and 19, 1991, the City held two public workshops to answer questions about the engineer's report. AR 2369. These workshops were purely voluntary on the City's part; no state law required the City to conduct them.

On September 23 and 24, 1991, the City held a public hearing on the proposed assessment district. Petitioners complain that "each homesite owner was only allowed to 'protest' the proposed special assessment by speaking to the city's council for no more than five minutes." Petition at 5. This description grossly mischaracterizes the City's actions. In fact, the City Council allowed an attorney representing Petitioners' interests (counsel for the Save the Keys Committee) to speak for an entire hour. AR 2512, 2535-55. Although, due to time constraints and the large number of people

who wished to speak (54 individuals in all), the Council did limit the homeowners' comments to five minutes each, Petitioners fail to mention that the Council agreed to extend the protest hearing for an additional day in order to give every person in attendance an opportunity to testify. AR 2562, 2799-2887. Under the circumstances, the City provided opportunities for public participation that more than satisfied the requirements of due process. *See Norwood*, 172 U.S. at 296 (assessment district is valid if the affected property owners are given notice and an opportunity to be heard).

Petitioners also complain that the protest hearing was not conducted like a trial, in that "[o]aths were not administered; testimony was not taken; evidence was not received; [and] [t]he homesite owners were not allowed to examine or cross examine witnesses. . . ." Petition at 5. However, Petitioners cite no authority for the proposition that such procedures are required to form an assessment district, which is a legislative act. The cases cited by Petitioners do not involve special assessments and do not remotely demonstrate that Petitioners' due process rights were violated. *See* Petition at 13.

In forming the assessment district, the City thus provided opportunities for public participation that exceeded the requirements of due process. Petitioners' Fourteenth Amendment claim therefore does not merit review.

CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

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